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Supreme Court, U.S.
FILED

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No. 03-

IN THE

Supreme Court of the United States

JUNE JAMES,

Petitioner,

v.

RICE UNIVERSITY, KRISTI SUTTERMAN and KYLE CAVANAUGH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RONALD H. TONKIN
Attorney for Petitioner
2777 Allen Parkway, Suite 1080
Houston, TX 77019
(713) 942-9111

185705

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether a trial court abuses its discretion in denying relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for excusable neglect and/or in the interest of justice where plaintiff's counsel unbeknownst to her committed gross malpractice in failing to appear at court setting, failed to communicate with opposing counsel and failed to produce discovery and where the facts constitute "unusual or unique circumstances.

2. Whether the circuit court erred in failing to follow the case law of its own circuit in addressing the Rule 60(b) motion and the question of the abuse of discretion by the district court.

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Appendix C — Order Of The United States District Court For The Southern District Of Texas Dated November 15, 2002 ..... 11a

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered November 12, 2003 affirming the dismissal of Petitioner's case by the district court.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported, but is reproduced as Appendix A.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its unpublished opinion on November 12, 2003 affirming the judgment of the United States District Court for the Southern District of Texas (Judge Lynn N. Hughes presiding) which was entered April 23, 2003 denying Petitioner's motion to reconsider and reinstate her complaint pursuant to Rule 60(b) of the Federal Rules of Civil procedure.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the interpretation of Rule 60(b) of the Federal Rules of Civil Procedure and the standard for abuse of discretion by a trial court.

STATEMENT OF THE CASE

A. *Proceedings Below*

Petitioner June James filed suit against Rice University and two of her former supervisors in April of 2000 for racial and national origin discrimination. On October 15, 2002, because of her counsel's neglect of the case and gross malpractice, Rice University filed a Motion for Sanctions, Including Dismissal or Want of Prosecution. On November 4, 2002, Judge Lynn N. Hughes dismissed Petitioner's case for want of prosecution.

On December 26,2002, unbeknownst to Petitioner, her then-attorney, Rosalind Kelly filed on Petitioner's behalf a notice of appeal of the district court's final judgment dismissing Petitioner's suit.

On December 30, 2002, Petitioner terminated Kelly's representation and retained other counsel to represent her in pursuing her claims against Rice University. On January 8, 2003, Petitioner's new counsel filed an Unopposed Motion to Withdraw Counsel and Substitute Attorney-in-Charge for Petitioner, in addition to Petitioner's Motion for Relief from Judgment and Motion to Reinstate ("Rule 60(b) motion").

On January 13,2003, the district court granted Petitioner's motion to substitute new counsel of record, but denied Petitioner's Rule 60(b) motion, stating that it was beyond the district court's power to grant Petitioner's Rule 60(b) motion as it had been divested of jurisdiction because Kelly had filed a notice of appeal.

On February 7, 2003, Petitioner timely filed an amended notice of appeal, which amended her initial notice of appeal by also appealing the district court's denial of Petitioner's Rule 60(b) motion.

On February 10, 2003, Petitioner filed with the United States Court of Appeals for the Fifth Circuit her Motion for Limited Remand, asking the circuit court to remand the instant matter to the district court for the limited purpose of the district court considering Petitioner's Rule 60(b) motion and either granting or denying Petitioner's Rule 60(b) motion based upon its merits.

The Fifth Circuit granted Petitioner's Motion for Limited Remand on March 27, 2003. On remand, the district court denied Petitioner's Rule 60(b) motion on April 24, 2003 which resulted in the appeal to the Fifth Circuit. The Fifth Circuit on November 12, 2003 rendered its opinion affirming the judgment of the district court in denying the Rule 60(b) motion. (Appendix A)

B. *Statement of the Facts*[1]

In the latter part of 2000, Petitioner retained the services of Rosalind Kelly to represent her in a civil rights law suit against Rice University. Throughout Kelly's representation of Petitioner, Petitioner consistently made numerous attempts to keep herself informed of the progress of her case against Rice University. To that end, Petitioner made frequent telephone calls to Kelly's office; made multiple visits to Kelly's office; and sent numerous faxes, e-mails, and letters to Kelly's attention.

1. All facts stated herein are fully supported by the record which is on file with the district court in Houston, Texas.

Despite Petitioner's efforts, on or around November 5, 2002 Kelly informed Petitioner that her case had been "thrown out" by the district court, but that Kelly would get her case reinstated.

Petitioner continued to be involved following the initial dismissal by the district court. On or about November 7, 2002, Petitioner sent a letter to Kelly, wherein she requested that Kelly keep her abreast of all future developments in the case, and further, that Kelly forward all copies of documents to her in connection with the case as such documents were being sent or received by Kelly.

Between November 7 and 13, 2002, Petitioner continued to attempt to stay informed about her case, but Kelly refused Petitioner's calls and requests to meet. As a result, Petitioner took it upon herself to "stake out" Kelly's office to attempt to catch Kelly for a conversation. On November 13, 2002, after talking with friends who were attorneys, Petitioner went to Kelly's office and insisted that Kelly file a Motion to Reconsider. Petitioner took such pains to be involved in her case against Rice University that she even personally drove from Kelly's office in Dallas, Texas, to the federal courthouse in Houston, Texas, to file with the district court a Motion to Reconsider Dismissal of Action and Motion to Reinstate Case to Court's Active Docket.

On November 15, 2002, while in Houston, Petitioner obtained a copy of her file from the District Court. Although Petitioner knew that her case against Rice University had been dismissed by the district court, it was only upon obtaining a copy of her file that Petitioner learned that the district court predicated its dismissal of her case upon the gross negligence of Kelly, which gross negligence and

misconduct, according to the district court, took the form of Kelly missing discovery deadlines, failing to communicate with Rice University's counsel, and failing to appear for a conference. (Appendix 11a)

Upon Petitioner's discovery that Kelly's gross negligence had led to the dismissal of the case, she contacted other attorneys to determine her rights and to seek other representation.

Ultimately, in December of 2002 Petitioner fired Kelly and retained the service of another counsel to prosecute her claims.

With new counsel at the helm, Petitioner filed a Rule 60(b) motion on January 8, 2003, seeking relief from the district court's judgment dismissing her case. Following the district court's denial of Petitioner's Rule 60(b) motion because it believe it lacked jurisdiction to consider it, the Fifth Circuit subsequently remanded Petitioner's Rule 60(b) motion to the district court after determining the district court in fact possessed jurisdiction. The district court ultimately denied Petitioner's Rule 60(b) motion on April 24, 2003. (Appendix 9a)

In its order denying Petitioner's Rule 60(b) motion, the district court stated that it was "James' responsibility to monitor-and, if necessary, replace her attorney". The district court further noted that "James-whether through her own error or her lawyer's-repeatedly disobeyed the court's orders." (Appendix 9a)

REASONS FOR GRANTING THE PETITION

A. In affirming the dismissal of Petitioner's Rule 60(b) motion, the Fifth Circuit held that "the mistakes of counsel, who is the legal agent of the client, are chargeable to the client . . . no matter how 'unfair' this on occasion may seem". (Appendix 7a). The Court went on further to state "[t]hus, no matter how much sympathy we may have for Ms. Kelly's personal situation or the prejudice her neglect has inflicted upon her client, Ms. Kelly's action do not constitute the type of 'unusual or unique circumstances' justifying Rule 60(b) relief". (Appendix 7a)

Contrary to the holding by the Fifth Circuit, the egregious facts as outlined above warranted Rule 60(b) relief.

Courts have permitted relief where the order of dismissal results from such circumstances as an inability to consult with counsel [*Associates Discount Corp. v. Goldman*, 524 F.2d 1051 (3rd Cir. 1975)], a misunderstanding regarding the duty to appear [*Ellingsworth v. Chrysler*, 665 F.2d 180 (7th Cir. 1981), and an attorney's failure to meet a deadline [*Blois v. Friday*, 612 F.2d 939 (5th Cir. 1980)]. The Petitioner has shown that the errors made did not result from her culpable conduct [*Weiss v. St. Paul Fire and Marine Ins. Co.*, 283 F.3d 790, 794 (6th Cir. 2002), *cert. denied*, 537 U.S. 885 (2002)]. The Seventh Circuit in *Robb v. Norfolk & Western Ry. Co.*, 122 F.3d 354 (1997) discontinued its "hard and fast" rule barring trial judges, in their discretion, finding that an attorneys negligence in missing a deadline constitutes "excusable neglect".

Additionally, relief should have been granted "in the interest of justice" under Rule 60(b) if the relief would

not affect the substantial rights of the parties which in common legal parlance makes reference to "extraordinary circumstances". To show these circumstances, Petitioner had shown to the district court the actual injury perpetrated upon her by the gross negligence and misconduct of her attorney and that there were circumstances beyond her control. Both the district court and the Fifth Circuit acknowledged that Petitioner had been the subject of the gross negligence of her attorney. Courts have held that under this category of Rule 60(b) relief is appropriate where a client seeking relief from a default judgment demonstrated gross negligence on the part of counsel. *Liljeberg v. Health Serv. Acquisition Corp*, 486 U.S. 847 (1988). *Liljeberg* arose out of the Fifth Circuit, 796 F.2d 796 (1986).

The district court erred in denying Petitioner's Rule 60(b) motion in that it was predicated on the grossly negligent conduct of Kelly. Such a denial flies in the face of case law of Fifth Circuit granting Rule 60(b) relief to parties whose counsel has been negligent in their representation of their clients.

Additionally, the *Gould* factors[2], which district courts are instructed to take into account when considering a motion under Rule 60(b), supported relief for Petitioner in that her Rule 60(b) motion was not a substitute for appeal; her Rule 60(b) motion was made within a "reasonable time"; she did not have an opportunity to present her side of the controversy; she made every effort to monitor her case against Rice University; no great delay would have occurred had the district court granted her Rule 60(b) motion; and any malpractice action by her against Kelly would be inadequate.

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2. *United States v. Gould*, 301 F.2d 353, 355-56 (5th Cir. 1962).

Finally, when the district court denied her Rule 60(b) motion, it failed to take into account Fifth Circuit law holding that the dismissal of a party's case is a severe remedy that a district court may only resort to in drastic circumstances. In the case at bar, the record fails to indicate such drastic circumstances which warranted the denial of the Rule 60(b) motion.

B. The Balancing Act

Seeking relief from the district court's dismissal of her action against Rice University, Petitioner filed her motion under Rule 60(b) of the Federal Rules of Civil Procedure, which provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of judgment. Fed. R. Civ. P. 60(b).

By its own design, Rule 60(b) seeks to balance two inclinations: The desire to preserve the finality of judgments and the '"incessant command of the court's conscience that justice be done in light of all the facts.'" *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir. 1981) (*quoting Bankers Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir. 1970), *cert. denied*, 399 U.S. 927 (1970)). Indeed, Rule 60(b) has been viewed as being '"a grand reservoir of equitable power to do justice in a particular case.'" *Seven Elves*, 635 F.2d at 402 (*quoting Menier v. United States*, 405 F.2d 245, 248 (5th Cir. 1968)).

Perhaps more importantly, the Fifth Circuit has granted relief to movants whose cases were dismissed for reasons similar to those at bar.

In *Roberts v. Rehoboth Pharmacy, Inc.*, 574 F.2d 846 (5th Cir. 1978), the court granted Rule 60(b) relief to the plaintiff in a medical malpractice case whose new attorney failed to file a timely appearance. Likewise, in *Seven Elves v. Eskenazi,* 635 F.2d 396 (5th Cir. 1981), the court granted Rule 60(b) relief to defendants whose attorney failed to appear for trial. The rationale behind granting such relief lies in the belief that a plaintiff should not be unreasonably punished for the malpractice and/or gross misconduct of her attorney.

In the case at bar, in its order denying Petitioner's motion to reconsider and reinstate her case against Rice University, the district court noted that Petitioner missed discovery deadlines and failed to appear for a conference. (Appendix 11a). It is clear that these instances of neglect on Kelly's part caused the court to dismiss Petitioner's case against Rice University. Indeed, the only reason the case was dismissed was because of Kelly's conduct, of which Petitioner was unaware. When she became aware of the misconduct, she immediately took steps to remedy the failures of her former counsel.

Accordingly, district court abused his discretion in denying Rule 60(b) relief.

C. The *Gould* Factors

In *United States v. Gould*, 301 F.2d 353, 355-56 (5th Cir. 1962), the Fifth Circuit outlined eight (8) factors that district

courts should take into account when considering a motion under Rule 60(b). The factors are:

> (1) That final judgments should not be lightly disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether if the judgment was a default or a dismissal in which there was no consideration of the merits, the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether if the judgment was rendered after a trial on the merits the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack.

Application of the *Gould* factors supported relief for Petitioner's Rule 60(b) motion and reinstatement of her case.

1. ***Petitioner's Rule 60(b) motion was not a substitute for appeal.***

Petitioner did not seek to use her Rule 60(b) motion as a substitute for appeal, as she was clearly within the applicable time limit to appeal the district court's denial of her Second Motion to Reconsider. Instead, she brought her Rule 60(b)

motion for the purpose of seeking equitable relief from the dismissal of her case.

2. *Petitioner's Rule 60(b) motion was made within a "reasonable time."*

Petitioner made her Rule 60(b) motion within a "reasonable time" as that term is used in Rule 60(b). Indeed, despite her repeated requests that Kelly keep her informed of her case against Rice University, it was only when Petitioner took it upon herself to review her file at the federal courthouse on December 30, 2002 – a mere nine days before she filed her Rule 60(b) motion-that she first learned that her First Motion to Reconsider had been denied; that Kelly had filed a Second Motion to Reconsider; and that the Second Motion to Reconsider had also been denied. Accordingly, Petitioner made her Rule 60(b) motion within a reasonable time.

3. *Petitioner has not had an opportunity to present her side of the controversy.*

Petitioner's case was dismissed without a consideration of the merits. She did not have an opportunity to present her side of the controversy as a direct result of her attorney's gross negligence and misconduct. The Fifth Circuit has held that truncated proceedings of this type will be construed in a liberal manner in favor of holding a trial on the full merits of the case. *Seven Elves*, 635 F.2d at 403. Accordingly, the equities in this case strongly favored relief for Petitioner under Rule 60(b).

4. ***Petitioner made every effort to monitor her case against Rice University.***

The record reveals no complicity on the part of Petitioner in the inaction misconduct and gross negligence of Kelly, which occasioned the dismissal of her case. In fact, she made every attempt to be involved in her case against Rice University. Throughout Kelly's representation of Petitioner, she made numerous attempts to keep herself informed of the progress of her case against Rice University. Petitioner made numerous telephone calls and visits to Kelly's office, and sent Kelly numerous faxes, e-mails, and letters. Between November 7 and 13, 2002, when Kelly refused Petitioner's telephone calls and her requests to meet, Petitioner even went so far as to "stake out" Kelly's office in Dallas, Texas until she was able to catch Kelly for a conversation. It was at this time that she insisted that Kelly file a motion to reconsider. Further, on November 14, 2002, she personally drove from Kelly's office in Dallas, Texas, to the federal courthouse in Houston, Texas, to file with the court her First Motion to Reconsider. Based upon these actions, it is clear that she diligently monitored and pursued her case against Rice University, and that she was not complicit in Kelly's inaction, dilatory conduct and gross negligence.

5. ***No great delay would have occurred had the district court granted Petitioner's Rule 60(b) motion; malpractice action against Kelly would be inadequate and fruitless.***

Other equities also favored relief for Petitioner under her Rule 60(b) motion. To begin with, there were no intervening rights that would have been prejudiced by the granting of relief, and no great delay was likely to occur

should the district court have granted her Rule 60(b) motion. Additionally, and perhaps more importantly, any possible malpractice remedy that she has against Kelly would be inadequate to restore her to her prejudgment position, as Kelly does not have an insurance' carrier, and it is believed that Kelly does not own assets sufficient to compensate her in any malpractice action. Furthermore, she retained a law firm to pursue a state bar grievance against Kelly.

Petitioner had retained new counsel in the case at bar. Based upon her meetings with the her new counsel, she was confident that her new attorneys would prosecute her case as to the best of their abilities, and that they would adhere to all court imposed deadlines and orders.

6. *The district court's denial of the Rule 60(b) motion is contrary to case law from the Fifth Circuit.*

When the district court denied Petitioner's Rule 60(b) motion, it failed to take into account case law from the Fifth Circuit that held that the dismissal of a party's case is a severe remedy warranted only when drastic circumstances exist. Indeed, it is well established that dismissal with prejudice of an action is a severe remedy to which a court may resort only in drastic circumstances. *Silas v. Sears, Roebuck & Co.*, 586 F.2d 382, 385 (5th Cir. 1978).

Absent such drastic circumstances, the trial court's discretion is restricted to the application of lesser sanctions tailored to expedite proceedings and to achieve compliance with court orders. Dismissal is generally improper, and lesser sanctions are preferred, where neglect is clearly attributable to an attorney, rather than to an attorney's innocent client.

In the case at bar, the record failed to indicate drastic circumstances that are required to support an order of dismissal with prejudice rather than the imposition of lesser sanctions. *See Flaks a v. Little River Marine Constr. Co.*, 389 F.2d 885 (5th Cir. 1968) (dismissal inappropriate where delay was not so long as to indicate a desire not to prosecute, claim was neither vexatious nor fictitious, and plaintiff was not responsible for counsel's dilatory conduct).[3]

Additionally, the delay in Petitioner's case was not of such a length as to indicate that she did not desire to prosecute her claims against Rice University. Nor in these circumstances was dismissal necessary, as a first and final resort, to permit the district court to achieve its obligation to administer justice expeditiously. Absent such a showing, the district court should have imposed lesser sanctions, if any, especially where Petitioner was blameless for Kelly's actions. It is clear that the district court did not take the foregoing into account when it denied Petitioner's Rule 60(b) motion.

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3. *See also Blois v. Friday*, 612 F.2d 938 (5th Cir. 1980); *Hassenflu v. Pyke*, 491 F.2d 1094 (5th Cir. 1974).

CONCLUSION

The Fifth Circuit failed to follow its prior holdings regarding the abuse of discretion by the trial court in denying relief pursuant to a Rule 60(b) motion. Thus, for the foregoing reasons, certiorari should be granted.

Respectfully submitted,

RONALD H. TONKIN
Attorney for Petitioner
2777 Allen Parkway, Suite 1080
Houston, TX 77019
(713) 942-9111

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED NOVEMBER 12, 2003

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Summary Calendar

No. 03-20046

JUNE JAMES,

Plaintiff-Appellant,

versus

RICE UNIVERSITY; KRISTI SUTTERMAN; and KYLE CAVANAUGH,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas,
Houston Division
4:02-CV-1472

Before JONES, BENAVIDES, and CLEMENT, Circuit Judges.

PER CURIAM:*

Plaintiff June James appeals the district court's dismissal of her claims of race (African-American) and national origin

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

(Guyanese) discrimination and the district court's denial of a number of post-judgment motions made by James to reinstate her action. Some explanation of the background of the case and the procedural history is necessary to understand which motions are properly before this court and whether any relief is available to James.

I. Background

On April 23, 2002, June James filed suit against Rice University and two of its employees, Kristi Sutterman and Kyle Cavanaugh, alleging that the defendants discriminated against her based on her race and national origin in violation of the Civil Rights Act of 1964. That same day, Judge Hughes filed an Order for Conference which, *inter alia*, scheduled an initial pretrial conference for August 12, 2002, and ordered the parties to file a joint case management plan five days prior to the conference. In addition, the Order required counsel to have "interviewed their clients and mastered the documents" prior to the conference and indicated that "[f]ailure to comply with this order may result in sanctions, including dismissal, cost assessment and prolonged tirades by the court." On August 5, the parties filed a joint discovery/case management plan which provided specific dates by which the parties would make their initial disclosures, dates for the exchange of interrogatories and requests for production, and a process for scheduling depositions.

From that point forward, James, through her then-counsel, Rosalind A. Kelly, repeatedly failed to comply with the dates set out in the joint plan, failed to provide the required documents, and on at least one occasion, failed to appear for a scheduled conference. As a result, on October 15, Rice University moved to dismiss James's claim for want of prosecution. On November 1, James's attorney responded by describing a series of events in her personal life[2] that had hampered her representation of James and arguing that her personal failures should not result in a dismissal of James's allegedly meritorious complaint. In support of the merit of James's claims, Ms. Kelly provided a list of incidents that ostensibly indicated a pattern of discriminatory behavior on the part of Rice University and its employees.

On November 4, Judge Hughes held a hearing on Rice University's motion for sanctions. After extensive discussion of the merit, or lack thereof, of James's claim and whether James's case should be affected by her counsel's self-admitted errors, Judge Hughes announced that the case would be dismissed because James, through her attorney, had failed to "meet her responsibilities as the plaintiff." The next day, a one-line order was entered dismissing James's claim with prejudice.

On November 14, within ten days of the entry of the order dismissing the case, Ms. Kelly filed a motion styled "Motion to Reconsider Dismissal of Action and Motion to Reinstate Case to Court's Active Docket." This motion argued

2. These events included counsel's mother being bedridden in Tucson, Arizona with severe health problems and the demands of raising three toddlers.

the substantive merit of James's claim and requested reinstatement of the action. On November 18, Judge Hughes entered an order denying the motion on the ground that James had regularly missed court-ordered deadlines in the case and had not addressed these deficiencies in the motion to reconsider. On December 5, a second motion to reconsider was filed by Ms. Kelly. This motion attempted to explain the reasons for Ms. Kelly's repeated failure to meet the deadlines set by the district court. On December 10, the district court entered another one-line order denying James's second motion to reconsider. On December 26, Ms. Kelly filed a notice of appeal discussing the two motions to reconsider and indicating James's intent to appeal "the Court's order dismissing the action."

While these proceedings took place before the district court, James retained substitute counsel to pursue a malpractice claim against Ms. Kelly and take over the prosecution of her now-imperiled discrimination claim. On January 8, 2003, James's new counsel, Martin Shellist, filed a motion styled "Plaintiff June James's Motion for Relief from Judgment and Motion to Reinstate." This third motion argued that the failures of James's counsel should not be held against James and that the action should be reinstated. On January 13, the district court entered an order indicating that it did not believe it had jurisdiction to consider the latest motion filed by James because the filing of a notice of appeal divested it of jurisdiction. On February 7, after being denied an indicative ruling from the district court, James amended her original notice of appeal to include the January 13 order denying the latest motion. This court then

remanded the matter to the district court for a ruling on the merits of the Rule 60(b) motion, noting that a district court has jurisdiction to consider a Rule 60(b) motion while a notice of appeal is pending and may deny the motion or, with the leave of this court, grant the motion. Pursuant to this court's remand, the district court considered the motion and denied relief indicating that James was responsible for the errors and omissions of her lawyer.

II. Discussion

We must first consider which of the rulings made below are properly before this court and then proceed to evaluate the merits of the properly raised claims.

A. Original Dismissal Order

The original order dismissing the case was entered on November 5, 2002. Because the first motion for reconsideration was filed on November 14, within ten days of the entry of the dismissal order, and because it argues the merits of James's claim, it is appropriate to consider the motion as a Rule 59(e) motion to alter or amend the judgment. *See, e.g., Days v. Johnson*, 322 F.3d 863, 865 n.3 (5th Cir. 2003). A Rule 59(e) motion tolls the filing period for a notice of appeal while the motion is pending. *See* FED. R. APP. P. 4(a)(4)(A)(iv). The motion was denied by the district court on November 18 and thus the clock began running on James's ability to appeal the dismissal order. Because no notice of appeal was filed until December 26, the thirty-day period

for filing an appeal of the dismissal expired. *See* FED. R. APP. P. 4(a)(1)(A). As a result, this court lacks jurisdiction.[3] *Id.*

B. First Motion for Reconsideration

For the same reason, because James did not file a notice of appeal from the order denying her original motion under Rule 59(e) within the requisite thirty-day period, we lack jurisdiction to review the district court's decision to deny the first motion for reconsideration. *Id.*

C. Second Motion for Reconsideration

The appeal of the court's denial of the second motion to reconsider is within our appellate jurisdiction. Because that motion was filed more than ten days after the order dismissing James's action, it is properly viewed as a Rule 60(b) motion for relief from judgment. The decision to grant or deny 60(b) relief is within the sound discretion of the district court and will be reversed only for an abuse of discretion. *See Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 997 (5th Cir. 2002). Under Rule 60(b)(1), a court may relieve a party from a final judgment or order for "mistake, inadvertence, surprise

3. James's filing of two additional motions more ten days after the entry of the dismissal order are properly considered Rule 60(b) motions for relief from final judgment. *See, e.g., McKethan v. Texas Farm Bureau*, 996 F.2d 734, 743 n.25 (5th Cir. 1993). As such, they do not "affect the finality of a judgment or suspend its operation." Fed. R. Civ. P. 60(b). Thus, these motions do not toll the filing period for a notice of appeal except as provided for in Fed. R. App. P. 4(a)(4)(A)(vi).

or excusable neglect." *See* Fed. R. Civ. P. 60(b)(1). The extraordinary relief afforded by Rule 60(b) requires that the moving party make a "showing of unusual or unique circumstances justifying such relief." *Pryor v. U.S. Postal Serv.*, 769 F.2d 281, 286 (5th Cir. 1985).

James's argument that she should be excused from her complete lack of compliance with the district court's pretrial orders as a result of her counsel's personal circumstances is unavailing. This court has often held that "the mistakes of counsel, who is the legal agent of the client, are chargeable to the client . . . no matter how 'unfair' this on occasion may seem." *Id.* at 288 (citation omitted). As we have noted in the past, "[w]ere this Court to make an exception to finality of judgment each time a hardship was visited upon the unfortunate client of a negligent or inadvertent attorney, even though the result be disproportionate to the deficiency . . . [the] meaningful finality of judgment[s] would largely disappear." *Id.* at 288-89. Thus, no matter how much sympathy we may have for Ms. Kelly's personal situation or the prejudice her neglect has inflicted on her client, Ms. Kelly's actions do not constitute the type of "unusual or unique circumstances" justifying Rule 60(b) relief. *See, e.g.*, *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-36 (1962) (denying Rule 60(b) relief based on a claim of attorney incompetence); *Crutcher v. Aetna Life Ins. Co.*, 746 F.2d 1076, 1082-84 (5th Cir. 1984) (same).

Appendix A

D. Third Motion for Reconsideration

The principal difference between James's second and third motions for reconsideration is that the latter was filed by her second, and clearly competent, attorney. Preliminarily, it is important to note that a Rule 60(b) motion cannot be used as an alternate avenue to appeal a final order of a district court. *See, e.g., Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1203-04 (5th Cir. 1993). Here, because a notice of appeal contesting the denial of the second motion had already been timely filed, the successive 60(b) motion at issue here does not represent the typical scenario where a party is attempting to extend the time period for filing an appeal. However, where the grounds raised are essentially the same as those in the previous motion, to consider the merits of the successive motion would essentially allow reargument. Even assuming, arguendo, that the third motion is properly before us, the underlying argument is basically the same—James should not be punished for her counsel's complete and total incompetence. For the reasons discussed above, the grounds cited in the third motion do not merit Rule 60(b) relief.

The judgment of the district court is **AFFIRMED**.

APPENDIX B — ORDER FOLLOWING REMAND OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS DATED APRIL 23, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CIVIL ACTION H-02-1472

JUNE JAMES,

Plaintiff,

versus

RICE UNIVERSITY,

Defendant.

ORDER FOLLOWING REMAND

A lawsuit is the responsibility of the parties to it. They must comply with discovery requests, answer motions, appear for conferences, and produce witnesses to testify at trial or deposition. If a party chooses to delegate that responsibility to an agent who is not up to the task, she cannot complain to the court that her designated representative—the agent she has chosen to represent her in her legal affairs—is at fault. In court as elsewhere, the agent's misdeeds in the scope of the agency bind the principal.

It is James's case and James's responsibility to monitor—and, if necessary, replace—her attorney. James claims her

attorney did a poor job, but complaints about lawyer behavior are matters for the state bar or a malpractice suit. What is relevant to this dispute is that James—whether through her own error or her lawyer's—repeatedly disobeyed the court's orders. Her dereliction wasted the court's time, opposing counsel's time, and the defendant's time and money, warranting a sanction of dismissal.

James's third motion to reconsider and reinstate is denied (26).

Signed April 23, 2003, at Houston, Texas.

s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS DATED NOVEMBER 15, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CIVIL ACTION H-02-1472

JUNE JAMES,

Plaintiff,

versus

RICE UNIVERSITY,

Defendant.

ORDER

James repeatedly missed discovery deadlines. She did not communicate with Rice's counsel. She did not appear for a conference. In her motion to reconsider the dismissal of her case, she does not address these deficiencies; she merely attaches a sheaf of documents and asks for an opportunity to develop the factual basis of her claims. Belatedly presenting evidence—that she was ordered to furnish to Rice months ago—does not show that James has gained respect for the court's deadlines, or opposing counsel's time.

James's motion to reconsider and reinstate is denied (20).

Appendix C

Signed November 15, 2002, at Houston, Texas.

s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge